IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-101

BARBARA BLUM, Individually and as Commissioner of the New York State Department of Social Services, and PHILIP L. TOIA,

Petitioners,

—against—

JOANNE SWIFT, Individually and on behalf of her minor daughter, MICHELLE SWIFT, and on behalf of all other persons similarly situated,

Respondents,

LYLIA ROE, Individually and on behalf of her minor children, CAROL ROE and CHERYL ROE,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

Respondents respectfully submit this supplemental brief in further opposition to the petition for a writ of certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

I. HEW'S INTERPRETATION OF ITS OWN REGULATIONS IS CONTROLLING.

Respondents' primary contention, supported by the decisions of the courts below, is that the contested New York policy is prohibited by the express terms of two HEW regulations, 45 C.F.R. §§ 233.20(a)(2)(viii) and 233.90(a). HEW has taken the unequivocal position that the State policy violates its regulations.

The Solicitor General, expressing the views of the United States, agrees with respondents that the New York policy "conflicted with the regulations established by the Secretary to implement the requirements articulated in the Van Lare decision. See 45 C.F.R. §233.90(a) (Pet. App. 9a-13a)." Brief for the United States as Amicus Curiae, December, 1979, p.7. HEW took the same position in 1978. On February 27, 1978, HEW's Associate Commissioner for Family Assistance found that the

policy violates the applicable federal regulations. He stated that:

> "Under the regulations stated above, [i.e., sections 233.20 and 233.90], a State may not automatically reduce the money amount for any need item on the assumption that a non-needy, non-legally responsible person is contributing to the assistance unit or on the basis that the items of need provided by the State are shared with persons who are not included in the assistance payment." Letter of Barry L. Van Lare, Associate Commissioner for Family Assistance of HEW, February 27, 1978. (annexed hereto as Appendix "A").*

HEW's interpretation of its own regulations is consistent with the express terms of the regulations and the comments thereto, 42 Fed. Reg. 6583 (Feb. 3, 1977).

This Court has always given "HEW the deference due the agency charged with the administration of the Act,...." Lewis v. Martin, 397 U.S. 552,559 (1970). Accord, Miller v. Youakim, 99 S.Ct. 957,

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* Plaintiffs submitted this letter to the district court and it is part of the record.

969 (1979); New York Dept. of Social Services v. Dublino, 413 U.S. 405,421 (1973). In this case, HEW's view as to the meaning of its own regulations is controlling. "In construing administrative regulations, ' the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" United States v. Larinoff, 431 U.S. 864, 97 S.Ct. 2150,2156 (1977), quoting from Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1975).

Since HEW's interpretation is controlling, the petition for a writ of certiorari is without merit.

II. THE CONTESTED POLICY VIOLATES NEW YORK STATE LAW.

In Point III of "Respondents' Brief in Opposition", we argue that certiorari should be denied because irrespective of

the validity of the contested policy as a matter of federal law, petitioners are precluded from enforcing the policy because it has been declared invalid by the New York State courts as a matter of New York State law. See especially, Genin v. Toia, 47 N.Y.2d 959 (1979); Snowberger v. Toia, 46 N.Y.2d 803 (1978); Nelson v. Toia, 92 M.2d 575 (N.Y.Sup.Ct.), aff'd, 60 A.D.2d 796 (4th Dept. 1977), mot. for lv. to app. den., 44 N.Y.2d 646 (1978). In addition to the cited cases, we respectfully refer the Court to the recently reported decision in Matter of McNeil v. Shang, 69 A.D.2d 985 (4th Cir. 1979). In that case, the court made it clear that its holding that the state policy was invalid "was premised upon the interpretation of a State regulation." Id. (emphasis added). Despite this consistent line of final decisions, petitioners continue to maintain the validity

of the contested policy and their right to enforce it.

Moreover, even if petitioners are correct that some of the New York State Court decisions are viewed as resting in whole or in part on an interpretation of federal law, these decisions are final decisions that are binding on petitioners with respect to all similarly situated persons. See Matter of Jones v. Berman, 37 N.Y.2d 42,58 (1975)(class action status denied on the premise that New York Welfare officials will comply with the court's decision with respect to all similarly situated persons). This provides an additional dispositive reason supporting the denial of the petition for a writ of certiorari.

III. THE DISTRICT COURT EXPRESSLY FOUND SUBJECT MATTER JURISDICTION UNDER HAGANS V. LAVINE.

The Solicitor General notes that the courts below did not consider the question

of pendent jurisdiction, Brief for the United States as Amicus Curiae, p.5, n.3. The district court, however, did expressly deal with this question. Swift v. Toia, 450 F.Supp. 983,988 (S.D.N.Y. 1978)(22a). The district court specifically rejected defendant's claim that "jurisdiction should be declined on the basis that plaintiff's claims are insubstantial." (Id.) The court found that "it is obvious that plaintiff's arguments are neither so frivolous nor so insubstantial as to be beyond this court's jurisdiction. Hagans v. Lavine, 415 U.S. 528,539 (1974)." Id. (22a). The district court's reference to the substantiality doctrine, together with its citation to Hagans, make it clear that it found jurisdiction over the statutory claim because it was pendent to constitutional claims that were not insubstantial.

This Court's decision in Chapman v.

Houston Welfare Rights Org. 99 S.Ct. 1905 (1979) did not change the law in the Second Circuit. See especially, Andrews v. Maher, 525 F.2d 113 (2d Cir. 1975).* Indeed, this Court in Chapman cited the Second Circuit decisions dealing with jurisdiction in welfare cases with approval, stating that it "endorse[d] those holdings...." Chapman v. Houston Welfare Rights Org., supra at 1918.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: December 12 1979
New Rochelle, NY

Respectfully submitted,

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* Andrews is misspelled and miscited in the Chapman opinion. Chapman v. Houston Welfare Rights Org., supra at 1918.

APPENDIX A

APPENDIX "A"

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
WASHINGTON, D.C. 20201

OFFICE OF THE COMMISSIONER

REFER TO: IFA-211

FEB 27

Ms. Elayne Stutzman
Paralegal
Legal Aid Society of Albany Inc.
55 Columbia Street
Albany, New York 12207

Dear Ms. Stutzman:

This is in response to your letter of February 2, 1978 concerning New York State policy which you say violates Federal regulations in 45 CFR 233.20(a)(2)(viii) and 233.90(a).

Federal regulations in 45 CFR 233.20(a)(2)(viii) provides that "the money amount of any need item in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual...." This is also stated in 45 CFR 233.90(a)(1) which precludes States from prorating or otherwise reducing "the money amount for any need item included in the standard on the basis of assumed contributions from non-legally responsible individuals living in the household." These regulations were promulgated in response to a Supreme Court decision in Van Lare v. Hurley.

New York State has a standard for basic needs except shelter which varies by the size of the assistance unit. The State meets shelter as paid to a maximum which also varies according to the size of the assistance unit. You have indicated, however, that New York automatically reduces the amount in the standard when the household includes others who are not AFDC eligible. Under the regulations stated above, a State may not automatically reduce the money amount for any need item on the assumption that a non-needy, non-legally responsible person is contributing to the assistance unit or on the basis that the items of need provided by the State are shared with persons who are not included in the assistance payment.

You also raised question regarding the agency's assumption that the OASDI income of a child is available to others in the assistance unit. Federal policy provides that the

decision of whether to include a child with OASDI income rests with the applicant but if such child is included, his income must be considered available and reduce the payment. In a situation where an OASDI child is the only child, the caretaker relative would be eligible only if the child and his income is included in the payment.

We are sending a copy of this letter to our Regional Office so that they may look into your concerns.

Sincerely yours,

Barry L. Van Lare
Associate Commissioner for
Family Assistance

cc: Office of Regional Commissioner, New York